Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	CC Docket No. 96-45
	)	FCC 96-93
Federal-State Joint Board on Universal Service	)	

To: Office of the Secretary
Federal Communications Commission

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
ADMINISTRATIVE LAW COMMITTEE
RESPONSE TO
RECOMMENDED DECISION OF THE
FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE

Introduction

The Administrative Law Committee (the "Committee") of the Association of the Bar of the City of New York (the "City Bar Association") submits this additional comment in response to the Public Notice issued by the Federal Communications Commission's (the "FCC" or "Commission") on November 18, 1996.[1] The Public Notice seeks comment on the Recommended Decision (the "Recommended Decision")[2] of the

[1] DA 96 1891 ("Public Notice").

[2] *Federal-State Joint Board on Universal Service*, FCC 96-93, CC Docket No. 96-45 (adopted Nov. 7, 1996 and released Nov. 8, 1996).

Federal-State Joint Board (the "Joint Board"), which concludes the proceeding initiated last spring in a Notice of Proposed Rulemaking ("NPRM").[3/]

These proceedings were undertaken to implement the universal service provisions of the Telecommunications Act of 1996 (the "Act").[4/] In particular, the Act directs the Commission and the Joint Board to weigh four policy considerations set forth in Section 254(c)(1) in designating services to be subsidized from the universal service fund.[5/] The Act also includes six express principles to guide the development of policies for preservation and advancement of universal service,[6/] and permits adoption of additional

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3/ *Proposed Rules: Federal Communications Commission*, 61 Fed. Reg. 10499, 1996 WL 108610 (to be codified at 47 C.F.R. pts. 36 & 69) (proposed March 8, 1996).

4/ Pub. L. No. 104-104, 110 Stat. 56 (1996).

5/ Section 254(c)(10 of the Act directs that:

> [T]he Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported by Federal universal service support mechanisms shall consider the extent to which such telecommunications services--
> (A) are essential to education, public health, or public safety;
> (B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;
> (C) are being deployed in public telecommunications networks by telecommunications carriers; and
> (D) are consistent with the public, interest, convenience, and necessity.

The Joint-Board concluded that "while [it] must consider all four criteria [contained in section 254(c)(1)(A)-(D)] before determining that a service or functionality should be included, [the Joint Board] need not find that a particular service meets each of the four criteria." Recommended Decision ¶ 48.

6/ To summarize, the existing principles are: (1) Quality and Rates, (2) Access to Advanced Services, (3) Access to Rural and High Cost Areas, (4) Equitable and Nondiscriminatory Contributions, (5) Specific and Predictable Support Mechanisms, and (6) Access to Advanced Telecommunications Services for Schools, Health Care, and Libraries. *See* Act § 254(b). The Joint Board has also recommended adopting "Competitive Neutrality" as a principle. *See* Recommended Decision ¶ 23.

principles that "are necessary and appropriate for the protection of the public interest, convenience and necessity and are consistent with this Act." In this regard, the NPRM invited "interested parties to propose additional principles relevant to the choice of services that should receive universal service support."[7/]

The Committee's Recommendation[8/]

In its initial comment, the Committee recommended, *inter alia,* that the FCC adopt the following additional principle:

> ACCESS TO INTERACTIVE SERVICES. -- Individuals in all regions of the Nation, including low income individuals and those in rural, insular, and high cost areas, should have access to interactive information services that allow them to be publishers as well as recipients of information. The definition of "interactive information services" should evolve and relate directly to the services available to businesses and middle and upper income Americans dwelling in urban centers.

In other words, this principle states that universal *access* to infrastructure that supports interactive, or two-way, communications should be a goal of universal service policymaking.[9/] In particular, two footnotes to the Committee's recommended principle

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[7/] *NPRM* ¶ 8. *See also id.* ¶ 23.

[8/] Comment of the Association of the Bar of the City of New York, Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (Apr. 10, 1996) ("City Bar Ass'n Comment").

[9/] *See Alliance for Public Technology, Connecting Each to All: A Telecommunications Platform for the Information Age*, Washington, D.C. ("*Each to All*") (*cited in* Barry D. Fraser, *Telecommunications Competition Arrives: Is Universal Service Out of Order?*, 15 Cal. Reg. L. Rep. 1, 5 (Fall 1995)) ("*Telecommunications Competition*") ("Instead of mandating that specific services be made available at certain prices, universal access regulation would simply require that whatever services are available be made available to all on a nondiscriminatory basis."); *see also Each to All* at 56 n.5 (Historically, access has focused on issues such as physical access to a seamless and transparent web of monopoly local exchanges, equal access to long distance carriers, and availability to and ease of use by consumers, among others").

discussed open and interactive networks and the importance of providing "sufficient capacity and technological capability . . . to interconnect to services . . . ."[10/] The Committee's recommended principle parallels recommendations from other commenters.[11/]

The Committee did not advocate providing universal access to particular interactive services, such as the Internet, except to the extent already recognized by Congress and by the Commission as important for schools, libraries, and health care providers.[12/] Acknowledging that "ensuring universal access to interactive services is not the equivalent of ensuring actual use of such services,"[13/] the Committee also recognized that:

> full implementation of [its] proposed principle (*i.e.*, providing interactive services access to all individual residents) may be impeded at present by uncertainty concerning technological developments, competition among telecommunications stakeholders, and the potentially prohibitive cost of accelerating access to advanced telecommunications services. Therefore [the Committee proposed] that, at a minimum, all citizens should be provided with access to existing, established interactive services (including the Internet) through such institutions as libraries and schools.[14/]

10/ *See* City Bar Ass'n Comment nn.22 & 23 (citations omitted).

11/ *See, e.g.*, Comments of the Missouri Public Service Comm'n, Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (1996) (recommendation that customers receive toll-free access to Internet providers in order to "facilitate the use of the Internet. . . ."). *See also* Recommended Decision ¶ 663 (commentators supporting toll-free dial-up Internet access for health care providers and rural customers).

12/ *See, e.g.*, Joint Explanatory Statement of the Comm. of Conf., H.R. Rep. No. 104-458, 104th Cong., 2 Sess. 133 (1996): "[T]he Commission could determine that telecommunications and information services that constitute universal service for classrooms and libraries shall include dedicated data links and the ability to obtain access to . . . information services which can be carried over the Internet. (emphasis added.)

13/ City Bar Ass'n Comment at 10 n.3.

14/ City Bar Ass'n Comment at 13-14 (footnotes omitted). The Commission, elsewhere in the NPRM, had explicitly requested comment in the NPRM regarding "Internet access availability" pursuant to Section 254(c)(1) of the Act. First Notice, ¶ 23.

By linking Internet service access to all customers to the advanced telecommunication services[15/] contemplated under the Act, the Committee proposed that such advanced services could serve as a template for future services to all customers.[16/] Because the Committee recognizes that access to interactive broadband communications may not be technologically feasible or economically reasonable at the current time, it recommended that "Access to Interactive Services" be added as a *principle,* rather than a core service presently receiving universal service subsidies. Even though designation of core universal services may be limited by the *criteria* set forth in Section 254(C)(1)(A)-(D), the Joint Board and the FCC are not similarly limited to articulating *principles* for all customers to receive, in the future, additional core services that currently are mandated only for schools,

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15/ Section 254 of the Act does not contain a definition of "advanced telecommunications services." *See* Recommended Decision at ¶ 737. However, section 706 states that "[t]he term "advanced telecommunications capability" [for the purposes of that subsection] is defined, without regard to any transmission media or technology, as highspeed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology." *See* n.26 *infra*. "Information services" is defined in section 254 as "the offering of a capability for acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." *Id.*

16/ This approach builds upon the existing record under the Joint-Board's § 254(h) analysis of technological feasibility, and economic reasonability. *See, e.g.,* Recommended Decision at ¶ 621 *et seq.*; MCI Comments (April 12, 1996) at 8 (only if the benefit of the increased subscribership of the subsidized service exceeds the cost of the reduced subscribership of the subsidizing service should Commission add Internet access, data transmission capability, optional SS7 features (or blocking of those features), enhanced services, and broadband services). *See generally* Robert W. Crandall and J. Gregory Sidak, *Competition and Regulatory Policies for Interactive Broadband Networks*, 68 S. Cal. L. Rev. 1203, 1213-14 (July 1995) ("*Broadband Networks*") (discussing two effects of two economic rationales for regulating industry: externalities and natural monopoly).

libraries and health care providers.[17] The Committee believes that this "Access to Interactive Services" should be taken into account here because the *principles* articulated for universal service should encompass future-oriented plans for deployment of infrastructure capable of delivering advanced services.[18]

The Recommended Decision of the Joint Board

The Joint Board apparently presumed that the additional principle recommended by the Committee would have the effect of providing universal service fund support for Internet access services[19] and recommended that this concept not become an additional principle.[20] The Joint Board may have reached this conclusion because it found that "access to interactive communications" is already ensured due to the wide availability of voice grade access and single party service.

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[17] In fact, the principles set forth in the Act, such as "Access to Advanced Services" and "Access to Advanced Telecommunications Services for Schools, Health Care, and Libraries," are also future oriented.

[18] For example, the Recommended Decision addresses support of internal wiring for schools and pricing discounts for T-1 line access. *See* Recommended Decision ¶ 26 (Joint Board recommends that the Commission "use section 254(h) to provide universal service support to schools and libraries for telecommunications services, Internet access, and internal connections").

[19] *See* Recommended Decision ¶ 63 ("Several parties argue that Internet access should be supported.") (citing, *inter alia*, City Bar Association comments at 9-14); *see also* ¶ 377 ("Some commenters suggest providing universal service support for Internet access for low-income consumers.") (citing, *inter alia*, Bar of New York comments at 9-14).

[20] Recommended Decision ¶ 27: The Joint Board "disagree[d] with the Bar of New York's proposal that universal service definition be altered to include access to interactive services as a principle. We recommend that this concept should not become a principle."

The Joint Board recognized that voice grade access and single-party services may be necessary for interactive communications.[21] As a result of this finding, and for additional reasons set forth in the record, the Joint Board recommended that both "voice grade access to the public switched network" and "single-party service" be considered to be "designated" or "core services" worthy of universal service support.[22] The Joint Board also found that voice grade access and single-party service currently are widely available.[23] Specifically, the Joint Board stated: "We find that access to the Internet, to the extent that this implies non-toll access, *is* provided through voice-grade access to the public switched network."[24] Therefore, construing the Committee's principle as mandating support for voice grade access to the Internet means that the Committee's recommendation is essentially moot and therefore an unnecessary additional principle. As discussed below, however, the Committee's proposed principle should be construed more broadly.

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[21] *See* Recommended Decision ¶ 48 ("Voice grade access should also include the ability to place calls, including the ability to signal the network that the caller wishes to place a call, and the ability to receive calls, including the ability to signal the called party that there is an incoming call."). Interestingly, the Joint Board recognized that the Committee endorsed the proposition that single-party service is essential. *See* Recommended Decision ¶ 41 ("Bar of New York argues that single-party service is essential because it is recognized to be a prerequisite for Internet access.") (citing City Bar Ass'n Comment at 14).

[22] *See* Recommended Decision ¶ 68.

[23] *See* Recommended Decision ¶ 47 ("We conclude that single-party service is widely available and subscribed to by a majority of residential customers."); *id.* ¶ 48 ("We find that the record provides ample support for our conclusion that voice grade access, an essential element to telephone service, is subscribed to by a substantial majority of residential customers and its [*sic*] being deployed in public telecommunications networks by telecommunications carriers.").

[24] Recommended Decision ¶ 69 (emphasis added).

Access to Interactive Broadband Transmissions

While the Joint Board correctly identified that "access to the Internet" . . . *is* already widely available through voice-grade access, single party service," this by itself does not necessarily foreclose the need for an additional principle of universal access to interactive services. In fact, the Joint Board's discussion of the existing "voice-grade access, single party service" underscores the value of an additional principle to guide the impending "evolution of technology for broadband networks."[25/]

The Recommended Decision addressed access to advanced telecommunications services for schools, health care, and libraries, but did not specifically address whether voice grade and single party service are adequate to provide residential customers with all of the

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25/ *Broadband Networks* at 1203-04.

> [T]echnological advances in electronics, fiber optics, digital signal compression, and software . . . will allow some networks to deliver not only narrowband services, but also one-way and switched broadband services. These development of new uses for the network will encourage entry by a number of potential competitors for voice telephony, data transmission, distributive video (currently regarded as broadcasting or cable television), interactive video, and other electronic services such as banking, shopping, and advertising . . . . [A]lternative delivery systems for such networks [may] includ[e] completely fiber-optic networks, fiber/coaxial-cable networks, fiber-coax-wireless networks, direct-to-home-satellite networks, and "wireless cable" systems (including wireless cellular systems.

See also Allen S. Hammond, *Regulating the Multi-Media Chimera: Electronic Speech Rights in the United States*, 21 Rutgers Computer & Tech. L. J. 1, 35 n.89 (1995); Jim Chen, *The Last Picture Show (on the Twilight of Federal Mass Communications Regulation)*, 80 Minn. L. Rev. 1415, 1510 (1996) ("The desire for private, person-to-person communications may already have had the incidental effect of financing the most sophisticated mass media facility ever imagined: interactive, "on-demand" information services and audiovisual programming delivered over phone lines.").

benefits of access to the Internet or other advanced telecommunications services.[26] The Joint Board found "that voice grade access should occur in the frequency range between approximately 500 Hertz and 4,000 Hertz, for a bandwidth of approximately 3,500 Hertz."[27] The 3,500 Hertz standard for an ordinary voice telephone circuit translates roughly into the ability to carry data at about 0.01 to 0.1 Mbps (Megabits per Second).[28] As recognized in the Recommended Decision itself,[29] service offerings such as video-on-demand, medical

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[26] *Cf.* Act § 706 ("Advanced Telecommunications Incentives"); *see* Comments of Netscape Communications Corporation (April 12, 1996) at 23. Section 706 of the Act allows "the Commission to 'encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans, specifically including schools, through regulatory reform and by "remov[ing] barriers to infrastructure investment." *Id.* (quoting Act § 706(a)). Netscape stated that section 706 (together with section 707) of the Act "give[s] the Commission more flexibility than Section 254's universal service requirements--since the Commission is not limited to setting price-support mechanisms, and can act directly to accelerate the deployment of telecommunications infrastructure . . . ." *Id.* The Joint Board concluded, however, that "Congress contemplated that section 706 would be subject to a separate rulemaking proceeding" and therefore declined to consider section 706 in the context of the instant proceeding. Recommended Decision ¶ 617.

[27] Recommended Decision ¶ 48.

[28] *Federal Broadband Law* § 2.3. Users with access to ISDN lines, high speed leased line connections, cable modems, and other technological developments can increase bandwidth. 100 Mbps, a digital standard, is roughly equivalent to 6 MHz, an analog standard. *Id.* § 2.3.

[29] Recommended Decision ¶¶ 651-654 ("The Advisory Committee, and the majority of commenters who recommended a specific level of telecommunications bandwidth capacity to support rural health care providers, concluded that, to ensure access to the appropriate level of these services, health care professionals should be able to choose among any telecommunications services supporting a capacity of up to and including 1.544 Mbps or its equivalent."). The Joint Board recognized, however, that it had insufficient information from which to draw a conclusion regarding the costs and benefits of subsidizing bandwidth capable of meeting the needs of rural health care providers. Recommended Decision ¶ 654. The Joint Board, and the FCC, have therefore requested additional information on this point in the recent Public Notice. *See* Second Notice ¶ 4.

imaging,[30] two-way interactive distance learning and high definition television (HDTV) might require bandwidth of 1.544 Mbps.[31] Also relevant to the issue of bandwidth are the plans of cable and telco industries to build systems with a bandwidth of 750 megahertz.[32]

Thus, "voice grade access" at the 3,500 Hertz standard will not ensure access to interactive services that require significantly greater bandwidth. This is problematic because the benefits of access to such broadband interactive services are well recognized:

> Electronic communication will no longer be a predominantly passive mode of interaction conducted via one-way, single-format information streams controlled by a limited number of senders. Instead, communication will be an interactive process conducted via two-way, multiple-format information streams controlled by users of the media. BCNs [Broadband Communications Networks] thus have the potential to shift the locus of control over communication from the privileged government-sanctioned media to a greater proportion of the public . . . .

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[30] *See generally* Comments of the American Telemedicine Association on the Notice of Proposed Rulemaking and Order Establishing Joint Board.

[31] *See Revving up the speed limit on the information Superhighway*, M2 Presswire, July 10, 1996 (announcement by Bell Atlantic concerning "significant progress" in deploying a universally available broadband network in urban, suburban and rural parts of the state [of Pennsylvania]; outlining plans that will culminate in broadband network accessible to all Bell Atlantic customers by 2015).

[32] *See* Michael Botein, *Cable/Telco Mergers and Acquisitions: Antitrust vs. Telecommunications Act Approach, printed in The Telecommunications Act of 1996*, at 481, 496-97 (PLI 1996):

> [C]able operators and LECS seem to be planning to build essentially the same types of systems -- under two different names. The cable industry talks in terms of "750 megahertz systems"--that is, a system with a bandwidth of 750 megahertz. By comparison, the telco industry has christened its system as "video dialtone" ("VDT") or "hybrid fiber coax" ("HFC").

See also Ralph J. Andreotta, *The Promise of a Competitive National Information Infrastructure*, 1994 CommLaw Conspectus 9 (1994) (comparing impediments of traditional voice grade telephone service provided over twisted-pair analog copper wire with wider bandwidth digital technology).

> Most important, however, this new control will allow individuals and groups to become electronic speakers and publishers.[33/]

Finally, "Access to Interactive Services" remains an important additional principle because it encompasses a vision of democratic and educational exchange for individual citizens, which is not a goal explicitly contained in any of the other six principles already set forth in the Act. Such an additional goal could contribute to setting universal service policies in many ways. For instance, the principle of "Access to Interactive Services" could assist the FCC in interpreting the principle of "Competitive Neutrality," which has been recommended by the Joint Board and which our Committee endorses. Services might be deemed to be "neutral" only if both would-be competitors transmit one or two ways; in other words, a cable company transmitting video one-way would not be "competitively neutral" with a telephone company providing two-way video dialtone.

Non-Toll Access to Interactive Services

The finding of the Joint Board that Internet access "is provided through voice-grade access to the public switched network" implies that "voice grade access" will remain a non-toll service.[34/] "Voice-grade access" may not remain "non-toll," however, if access charge reform permits differing charges for voice and data transmissions. Some NPRM commenters argued that the cost of voice-grade, single-party service does not reflect the full costs involved in local usage, such as switching, loop costs, maintenance and transport

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[33/] Allen S. Hammond, IV, *Regulating Broadband Communication Networks*, 9 Yale L. J. 181, 183-84 (1992).

[34/] Recommended Decision ¶ 69.

costs.[35] Local telephone companies are already lobbying the FCC to allow metered local usage that differentiates between voice and data calls.[36] In addition, the availability and growth of Internet telephony may continue to be a part of this debate.[37]

As the FCC has recognized, such access charge reform is "intensely interrelated" to universal service reform.[38] For example, allowing toll charges for data

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35/ *See* Recommended Decision ¶ 203 ("For example, Ameritech argues that the cost of single-party, voice grade service includes not only the cost of the loops, but also a portion of the local switch, as well as maintenance and other joint and common costs and residual costs. In addition, USTA argues that the provision of voice grade access to the public switched network, touch-tone and single-party service entail switching and transport costs in addition to loop costs.") (citations omitted).

36/ *See, e.g.*, Mark Landler, *Bells Want U.S. to Make Internet Providers Share Access Costs*, N.Y. TIMES, Nov. 25, 1996, at D1 & D10 ("The Federal Communications Commission is to begin changing [data traffic] telephone regulation next month with a proceeding intended to redesign the network access charges that long-distance carriers and possibly Internet providers pay to the Bells. Because Internet service providers do not now pay these charges, the Bells contend that they are not getting their fair share of Internet revenue.").

37/ *See, e.g., Provision of Interstate and International Interexchange Telecommunications Service via the "Internet" by Non-Tariffed, Uncertified Entities*, RM No. 8775 (March 1996) (regarding a petition filed by America's Carriers Telecommunication Association (ACTA) seeking a declaratory ruling, special relief, and institution of a rulemaking proceeding dealing with Internet telephony and with FCC regulation of the Internet). "Internet telephony" is the ability to transmit voice calls, possibly accompanied by video images, over the Internet rather than the telephone companies' wires.

38/ *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (CC Docket No. 96-98): Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 95-185, First Report and Order (Aug. 1, 1990) ¶ 8 ("It is widely recognized that, because a competitive market drives prices to cost, a system of charges which includes non-cost based components is inherently unstable and unsustainable. It also well-recognized that access charge reform is intensely interrelated with the local competition rules of

(continued...)

transmissions might particularly affect low income consumers who opt for toll limitation[39] and lack "access to the Internet" after they reach their toll call limit. Thus, if access charge reform does allow for differential pricing for voice and data calls, universal service subsidies might be necessary to ensure access to interactive services.

Conclusion

The Committee on Administrative Law of the Association of the Bar of the City of New York respectfully requests that the Commission reconsider the Joint Board's determination with respect to the additional principle proposed by the Committee and, for the reasons set forth above and in the Committee's initial Comment, to adopt its proposed additional principle regarding access to interactive services.

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[38](...continued)
section 251 and the reform of universal service. We will complete access reform before or concurrently with a final order on universal service.").

The Joint Board also recognized that voice grade access is linked to local usage. *See* Recommended Decision ¶ 49 ("Based on strong support in the record, we also recommend including a local usage component within the definition of voice grade access. The record suggests that local usage is essential to realizing the full benefits of voice grade access").

[39] *See, e.g.,* Recommended Decision ¶ 384 ("The Joint Board recommends that the Lifeline Assistance program for eligible low-income consumers include voluntary toll limitation, in addition to the services mentioned above. Because voluntary toll blocking, allows customers to block toll calls, and toll control allows customers to specify in advance a certain amount of toll usage per month or billing cycle, these services assist customers in avoiding involuntary termination of their access to telecommunications services. Therefore, we find that providing voluntary toll limitation free of charge to low-income consumers should help increase subscribership among low-income consumers.").

Respectfully submitted,

THE ASSOCIATION OF THE BAR
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COMMITTEE ON ADMINISTRATIVE LAW

By_____
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Dated: December 19, 1996
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*** Chair of the Telecommunications Sub-Committee and principal co-drafter of this Response.

CERTIFICATE OF SERVICE

I hereby certify that, on December 19, 1996, I served a copy of the foregoing **Association of the Bar of the City of New York Administrative Law Committee Response to Recommended Decision of the Federal-State Joint Board on Universal Service**, to everyone on the attached list by first-class United States Mail.

Dated: December 19, 1996
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